Nos. 79-881 and 79-883

In the Supreme Court of the United States

OCTOBER TERM, 1979

JOHN N. MITCHELL, PETITIONER

v.

BERTRAM ZWEIBON, ET AL.

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v.

JOHN N. MITCHELL

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR PETITIONER AND CROSS-RESPONDENT

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1. In its initial decision in this case, a plurality of the court of appeals held that "the procedures and remedies of [Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510 *et seq.*] completely occupy the wiretapping field except to the extent the President's powers were rendered constitutionally immune from the warrant procedure of the Fourth Amendment." 516 F. 2d 594, 666 (1975) (*Zweibon I*) (emphasis deleted).

The court further held that "the relevant standard of good faith in this case * * * [would not be] that literally specified in Section 2520" (516 F. 2d at 670-671; *id.* at 688 (Robb, J., concurring in part)),[1] which provides a "complete defense" for wiretaps authorized in "good faith reliance on a court order or legislative authorization," 18 U.S.C. 2520. Instead, the court held that a "good faith defense to liability, whether under the *Bivens* rationale or the statutory theory, will be established if appellees can demonstrate (1) that they had a subjective good faith belief that it was constitutional to install warrantless wiretaps under the circumstances of this case; and (2) that this belief was itself reasonable." 516 F. 2d at 671 (footnote omitted).

2. Respondents' supplementary memorandum now argues that this holding is in conflict with a recent decision of another court of appeals in *Campiti* v. *Walonis*, No. 79-1213 (1st Cir. Dec. 18, 1979). They urge this conflict as an additional ground for review.[2]

We do not agree that the decision in *Campiti* conflicts with the holding in *Zweibon I* concerning the scope of the statutory good-faith immunity in actions under Title III.[3] More important, however, the question that respondents address in their supplementary memorandum was not

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[1]Chief Judge Bazelon did not join in this portion of the plurality opinion, believing instead that petitioner and other Attorneys General who misinterpret the law should be strictly liable. 516 F. 2d at 679-681.

[2]Respondent incorrectly state (Resp. Supp. Mem. 3) that the statutory defense in Title III (18 U.S.C. 2520) was not raised in this case. The defense was raised but was not reached by the court due to its disposition of the other issues.

[3]*Campiti* did not concern the type of situation before the court of appeals in *Zweibon I*, which involved the retroactive application of newly developed rules of constitutional law to establish liability under Title III. See 516 F. 2d at 671, 672.

raised either in the petition (No. 79-881) or in respondents' cross-petition (No. 79-883).[4] It is therefore not properly framed for review and, even assuming that the petitions are granted, should not be considered by the Court. See Sup. Ct. R. 23(c); *Whirlpool Corp.* v. *Marshall*, No. 78-1870 (Feb. 26, 1980), slip op. 6 n.10.

Respectfully submitted.

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Solicitor General

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[4]Respondents simply mentioned this issue *en passant* in their original memorandum in response to the petition (Mem. 3). The issue is not addressed even obliquely in respondents' cross-petition. It also is not comprised within either of the questions presented in the cross-petition (79-883 Pet. 2).